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Arthur L. Goldberg

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SUBAGENT AS DEFINED IN PENNSYLVANIA

The Supreme Court of Pennsylvania in *McKnight v. the People's Pittsburgh Trust Co.*¹ has clarified the definition of the term "Subagent" as it is to be considered in Pennsylvania law. It has attached thereto a precise meaning accompanied by specific legal incidents.

The facts upon which the court laid down the rule here commented upon are these: by virtue of two foreclosed mortgages, the People's Pittsburgh Trust Co., hereinafter referred to as the bank, became the owner of two theatres. The firm of George Brothers, real estate consultants, was the agent for the bank in the management of the said theatres. W. D. George, of the aforementioned firm, placed one McKnight in charge of the two theatres, in which position he remained for a period of 10 years, after which time he entered the military service.

During his employment McKnight received a regular monthly salary, and at the time of his departure received a testimonial check for \$300.00 from George Brothers. Prior to the time he was separated from the service, he requested additional compensation from George Brothers for his services in developing the theatres for sale, which he alleged they had orally agreed to pay him. When they refused to compensate him further, averring that full payment had been made for services rendered, McKnight instituted this action against the bank to recover additional compensation.

The bank denied liability, saying its contract for the management and control of the theatres was made exclusively with George Brothers and any services of McKnight were done as an employee of George Brothers only. The situation presented is briefly this:

P hires A to manage theatres; A hires SA to do the actual work. A makes certain commitments to SA regarding compensation. Questions: What is SA's relation to P? Is P liable on A's agreement with SA? Is SA really a subagent?

The court held that McKnight was the agent of George Brothers and not the agent of the bank. His relation to the bank was merely subagent and as such the bank was not liable for his compensation.

This case is important because the Pennsylvania Supreme Court has now taken a definite stand on its definition of *subagent*, and has adopted the view that when a principal gives an agent authority to do a job and, in addition, there is authority from the principal, express or implied, that the agent may enlist the assistance of other persons to accomplish that job as agents of the agent, those other persons are *subagents* of the principal. In no other sense is the term subagent to be used, if it is to be used correctly. In this situation, there is no privity of contract between the principal and the subagent, and the principal is not liable for the compensation of that person.

¹ 360 Pa. 290, 61 A. 2d 820, (1948).

In contrast with this situation is the case where a principal authorizes his agent to do a certain job, and in addition gives him other *authority*, express or implied, to appoint another to do the job *for the principal*. Should the agent exercise this power and appoint someone, in this situation the person appointed would be *another agent* of the principal, hereinafter referred to as A2. The person hiring in this case would be the principal, although the ministerial task of hiring was accomplished by an agent. There would be privity of contract between A2 and the principal and the principal would be liable for A2's compensation.

It is in this latter situation that the Pennsylvania courts have seemed confused in their terminology. They have frequently termed A2 a subagent and have inconsistently placed subagents' rights and duties upon him.

It is interesting to note as a point of judicial tendency that in several instances in the *McKnight* case the court uses the Restatement of Agency as practically the sole basis for its position; in so doing it appears to be following the tendency of Pennsylvania courts to adopt Restatement principles.

The following two cases decided by the Pennsylvania court in 1932 and 1933 illustrate the confusion in terminology which was apparent in cases involving sub-agency prior to the opinion of the principal case. In *White et ux v. Macenbrag*² plaintiff sued defendant in trespass for damages for injuries occasioned by a fall from a porch on the second floor of a house, said fall being a result of a defective railing. The defendant was an agent of the owner of the house.

The railing was fixed by a carpenter who was hired by defendant as agent for the owner. Defendant had authority to collect for the owner, manage the property for the owner, and to hire repairmen for the owner if the need arose.

The defendant in this case is an agent. The carpenter is referred to by the court as a "subagent". The reason which the court cites in determining that the defendant agent was not liable was:

"Where an agent has authority to employ subagents, he will not be liable for their acts or omissions unless in their appointment he is guilty of fraud or gross negligence or improperly cooperates in the acts or omissions."³

Applying the Restatement definition adopted by the Pennsylvania court in the *McKnight* case, the carpenter in this case would not be a subagent at all. He would merely be another agent of the principal who was the owner of the house. What had happened was this: The principal had given the agent authority to appoint another agent to do the repair work. There was therefore a privity of contract between the carpenter and the owner for whom the work was being done.

According to the definition adopted in the *McKnight* case, the carpenter was improperly referred to as a subagent; the reason that D was not liable was that

² 309 Pa. 266, 163 A. 521, (1932).

³ 15 Pa. Euper. Ct. 491, 495, (1901).

the carpenter was not an agent of the defendant in any sense. Another case in which the same confusion was evident was *Weaver v. Foundation Co., et al.*⁴ Here a corporation which owned property in Philadelphia caused an apartment house to be erected thereon. Plaintiff sues defendant for injuries incurred because of faulty work of a subcontractor. Defendant was an agent of the owner, employed to hire the subcontractors and to superintend the work.

The court refers to the subcontractor as a subagent, and quotes the rule mentioned *supra* (3) to the effect that an agent with authority to employ subagents is not liable for their acts or omissions unless negligent in their selection.

Applying the rule adopted in the *McKnight* case, these subcontractors *are not subagents*, but are merely agents of the owner. The authority given by the owner to his agent, the defendant, was to appoint another agent to do the actual work of building. The subcontractor in this case was that other agent, *i. e.*, A2.

Therefore since the defendant merely brought about the status of principal and agent as between the owner and the subcontractor, the defendant is not liable for the wrongful acts of the subcontractor, not because the subcontractor is a subagent as the court reasons, but rather because the subcontractor is an *agent of the owner* and there is no contract at all between the defendant and the subcontractor.

The connotation given by the Pennsylvania courts was that the word subagent was used only as a distinguishing point between a party *appointed by the agent*, as against a party *appointed by the principal*. It did not use the term to indicate certain direct legal incidents. In Pennsylvania cases prior to the *McKnight* case, the courts seemed reluctant to decree that an agent could appoint a subagent without subjecting the principal to liability for that subagent's compensation; a fact due, no doubt, to the court's confusion as to the meaning of the term subagent. This point is brought out in the Pennsylvania annotations of the Restatement of Agency.

The difficulty of the Pennsylvania courts in the past seemed to center around the court's failure to differentiate between the authority of an agent to appoint another agent for the principal and the authority to appoint a *subagent*, who in actuality would be an *agent of the agent*; in this latter situation the subagent *could not* look to the principal for compensation.⁵

The difference is in the instruction and authority given the agent by the principal. This is brought out with reasonable clarity in one of the comments of the Restatement⁶ which is referred to in the principal case:

⁴ 310 Pa. 310, 165 A. 381, (1933).

⁵ A subagent employed by an agent does not become the agent of the principal, and no privity of contract exists between them although the employment is with the principal's consent. *In re U. S. Bank and Trust Co.*, 22 D. & C. 226.

⁶ RESTATEMENT, AGENCY, § 5 comment (a).

"An agent may be authorized to appoint another person to perform an act for the principal which the agent is authorized to perform, or to have performed. The agreement may be that upon the appointment of such a person the agent's function is performed and that thereafter the person so appointed is not to be the representative of the agent, but is to act solely on account of the principal, in which case the one so appointed is an *agent* not a *subagent*."⁷

Since in this instance the person appointed is an agent of the principal and not a subagent, the *principal would be liable for his compensation*. The comment of the Restatement *supra*, continues:

"...on the other hand, the agreement may be that the appointing agent is to undertake the performance of the authorized act either by himself or by someone else and that the person so appointed while doing the act *on account* of the principal who consequently will have the responsibility of a principal with respect to such person. If this is the agreement, the person so appointed is a subagent." (Italics supplied)

Mechem in his book on agency also adopts this view when he says:⁸

"The agent, having undertaken to transact the business of his principal, employs a subagent on his own account, to assist him in what he has undertaken to do, even though he does so with the *consent* of the principal, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is therefore the agent only."

In this situation, the principal is not liable for the compensation of the subagent both according to the view in the Restatement and as adopted in Pennsylvania.⁹

A subagent, as defined in the Restatement of Agency and as adopted by the Pennsylvania Court in the principal case, is:¹⁰

"A person to whom the agent delegates as his agent the performance of an act for the principal, which the agent has been empowered to perform through his own representative."

In a subsection of section 5, it is noted that an agent may be appointed with relative degrees of authority, and if as a result of such appointment he has the authority to appoint another to do the actual work, the agent then assumes the position of a principal insofar as that hired person is concerned. The court goes even further in a sense by stating that if the authority of the agent devolved from custom and usage of a particular business or of a particular community, there is an *inference* that the regular employees of an agent are *subagents*.

⁷ Italics supplied.

⁸ MECHEM on Agency, 2nd edition, § 333.

⁹ 144 Pa. Super. 470, 19 A. 2d 566, (1941). An agent *authorized* to sell on commission cannot employ other agents under him at the expense of his principal. *De Basil v. Pardo*, 6 Sadler 148, (1887). See also *Corpus Juris*; Agency, § 445.

¹⁰ RESTATEMENT, AGENCY, § 5. Another definition of subagent, as found in *Corpus Juris* § Agency 6: When an agent employs a person as his agent to assist him in the transaction of the affairs of his principal, the person so employed is a subagent.

The court then cites as its authority Restatement¹¹, to the effect that: "If an agent employs a subagent, the agent is the employing person and the principal is not a party to the contract of employment except where by express promise, or otherwise, he becomes a surety. He is not therefore subject to pay the agreed compensation."

It is extremely important in considering situations of this type, to differentiate between these two situations: first, the ability of a subagent to affect the legal relationship of a principal in a manner in which the principal will be bound to a third party, for as the court points out:

"As far as the contractual relations between the principal and third persons are concerned, a subagent has the same power as agent." and second, the ability of the agent to bind the principal insofar as making him responsible for the compensation of a subagent, for as Restatement¹² notes:

"The distinction between and subagency is important only in its effect upon the relationship between the principal, agent, and subagent."

In light of the foregoing discussion, and as a result of the decision in the principal case, the following points appear to be conclusive in this Commonwealth:

1. A subagent is defined as in section 5 of the Restatement of Agency.
2. If a principal hires an agent and authorizes this agent to do a certain job, or to appoint another to do the job, and the agent appoints another to do the job for the principal, that person appointed is not a subagent, he is merely another agent to the principal.
3. The term "Subagent" is now a word with legal meaning. A subagent is the employee of the agent; consequently he bears the same relationship to the agent, as the agent bears to the principal.
4. The principal is not a party to that contract of employment unless he becomes a surety by express promise or otherwise.
5. The principal is not liable for the payment of the subagent's compensation.
6. As far as the contractual relations between principal and third persons are concerned, a subagent has the same power as an agent.
7. The distinction between agency and subagency is important only in its effect upon relations between principal, agent, and subagent.

In certain cases the subagent may obtain payment from the principal for services or advances by the enforcement of a lien. The principal may also be liable to a subagent for harm caused by directing him without warning to do acts which the principal should know to be dangerous. These two situations are discussed in the Restatement of Agency §465 and §471, and are not within the scope of this writing.

ARTHUR L. GOLDBERG

¹¹ RESTATEMENT, AGENCY, §458, sub. (a).

¹² RESTATEMENT, AGENCY, § 142, sub. (b).